Supreme Court, U.S.

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No.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 2000

INTERNATIONAL FIDELITY INSURANCE CO., INC.,
Petitioner,

v.

DRILL SOUTH, INC.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

NEIL L. HENRICHSEN
Counsel of Record
HENRICHSEN SIEGEL, P.L.L.C.
1850 M Street, N.W. Suite 250
Washington, D.C. 20036
(202) 293-7766
Attorney for Petitioner
March 7, 2001

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QUESTIONS PRESENTED

1. Whether binding a Miller Act surety to a default judgment entered against the surety's principal in the same lawsuit and precluding the surety's assertion of defenses violates the surety's right to due process under the Fifth Amendment of the Constitution.

2. Whether the Eleventh Circuit's decision binding a surety to a default judgment entered against its principal in the same lawsuit creates a conflict within the Eleventh Circuit and with decisions in other Circuits.

PARTIES TO THE PROCEEDING

Petitioner is International Fidelity Insurance Company. Drill South, Inc. is the Respondent.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner International Fidelity Insurance Company states that it is a privately owned company, has no parent company and no publically held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

International Fidelity Insurance Company, Inc. ("International Fidelity"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's decision, published at 234 F.3d 1232, is reproduced in the Appendix (App.) at 1a. The district court's memorandum opinion and order dismissing International Fidelity's case is reproduced in the Appendix starting at 17a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on December 7, 2000. The Eleventh Circuit's Order denying International Fidelity's Petition for Rehearing and for *en banc* review was entered on February 6, 2001. This Court has jurisdiction to issue the writ under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the due process clause of the Fifth Amendment to the United States Constitution, which provides, in relevant part "No person shall be . . . deprived on life, liberty, or property without due process of law. . ."

This case also involves the Miller Act, 40 U.S.C. §§ 270a, 270b. The text of sections 270a and 270b of the Miller Act is set forth in the Appendix starting at 34a.

STATEMENT OF THE CASE

In 1995, Enviro-Group, Inc. ("Enviro-Group") contracted with the United States to perform construction work at the Redstone Arsenal in Huntsville, Alabama ("the Project"). App. 2a. International Fidelity issued payment and performance bonds on behalf of Enviro-Group, an Indiana Corporation with its principal place of business in Evansville, Indiana, as required by the Miller Act, 40 U.S.C. §§ 270a, 270b. App. 2a. Drill South, Inc. ("Drill South") entered into a subcontract with Enviro-Group to perform certain drilling work, and in turn, contracted with Miller Drilling Co., Inc. ("Miller Drilling") to perform work at the Project. App. 2a.

Miller Drilling brought suit for unpaid invoices against Drill South, Enviro-Group, and International Fidelity pursuant to the Miller Act and Alabama law. App. 2a. Jurisdiction in the United States District Court for the Northern District of Alabama was founded on 28 U.S.C. § 1332(a)(1) and on the Miller Act. Drill South cross-claimed against International Fidelity and Enviro-Group. International Fidelity answered Drill South's cross-claim and cross-claimed against Drill South and Enviro-Group. App. 2a-3a. In its Answer, International Fidelity asserted twelve affirmative defenses to Drill South's cross-claim, including "International Fidelity further adopts and incorporates by reference any and all claims and defenses of its principal, Enviro-Group." R1-12-4

Enviro-Group failed to answer and Drill South filed a Motion for Default Judgment. App. 3a. At the motion hearing, when counsel for Drill South stated that a default

judgment against Enviro-Group would bind International Fidelity, the court stated, "In other words, [the] surety doesn't get any opportunity to defend? . . . Can somebody say due process?" See Transcript of Proceedings, Appellant's Appendix to Case No. 99-6100 at 107-8.[1/]

Prior to the hearing, International Fidelity advised the parties and the district court that it took no position on the default judgment against its principal, *provided* that the default judgment was not binding on International Fidelity. App. 3a. The district court subsequently entered default judgment against Enviro-Group. App. 3a.

Thereafter, consistent with the parties' understanding that the case would proceed between Drill South and International Fidelity, the parties conducted discovery and later filed cross motions for summary judgment. App. 3a. In support of its motion, International Fidelity submitted evidence disputing Drill South's claims. Later, while the cross motions for summary judgment were pending, the district court concluded that International Fidelity was bound by the default judgment against Enviro-Group and dismissed the pending cross motions for summary judgment as moot. App. 3a.

[1/] The court also stated at the hearing "I'm more than a little bit concerned about, in effect, . . . converting this rather brief hearing into a substitute for a trial at which the surety would be expected to put forth any defense on the merits it might have. . . I certainly didn't intend to preclude anybody from being heard completely and having full opportunity to present anything they may have."

The district court entered Final Judgment against International Fidelity on September 5, 1997. App. 3a. Importantly, there was never any adjudication of the validity of Drill South's claims in this case. Instead, the judgment rendered was solely upon a default judgment against the bond principal. International Fidelity timely appealed to the United States District Court for the Eleventh Circuit. App. 3a. On December 7, 2000, the Panel affirmed the decision of the district court while acknowledging that "substantial dispute exists in the law as to whether a default judgment rendered against a principal is binding upon the principal's surety." App. 4a. On December 28, 2000, International Fidelity sought Rehearing and for *en banc* review, which was denied on February 6, 2001.

ARGUMENT

I. The Dismissal of International Fidelity's Claims Based Solely On The Entry Of A Default Judgment Against Drill South Denied International Fidelity Due Process.

It is fundamental and part of our deep-rooted historic tradition that everyone should receive his or her own day in court. See Martin v. Wilks, 490 U.S. 755, 762 (1989). This concept, woven into the Fifth Amendment to the Constitution and coined "due process," is designed to permit parties to present evidence at a trial on the merits and limits the circumstances under which a party may be denied the right to defend him or herself at trial. See Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 209, 78 S. Ct.

1087, 1094, 2 L. Ed. 2d 1255 (1958). See also American Surety Co. v. Baldwin, 287 U.S. 156, 168, 53 S. Ct. 98, 102, 77 L. Ed. 231 (1932) (Due process requires that there be an opportunity to present every available defense).

Under the law of suretyship, a default judgment rendered against a principal is not binding against the surety *unless* the surety's obligation is created by an undertaking to be bound by the result of legal proceedings against the principal, *e.g.*, a judgment bond. United States v. Maryland Casualty Co., 204 F.2d 912 (5th Cir. 1953); Axess International, Ltd. v. Intercargo Insurance Co., 183 F.3d 935, 940 (9th Cir. 1999); Restatement (Third) of Suretyship and Guaranty § 67(3). The surety in this case did not agree to be bound by the result of a legal proceeding against its bond principal.

International Fidelity was denied due process when it was precluded from continuing its defense of Drill South's lawsuit by application of a default entered against its bond principal. First, International Fidelity was defending its interests, as well as those that it acquired from its bond principal through assignment or subrogation. Second, the district court's statements at the April 7, 1997, default judgment hearing indicated that International Fidelity was not expected to present evidence contesting Drill South's claim until a trial. International Fidelity preserved its right to present evidence by asserting that it took no position on the default judgment against its principal, provided that the default judgment was not binding on it. The trial court did act in any way to suggest that International Fidelity's rights had been or would be abridged by the default judgment entered against Drill-South until later in the proceeding.

International Fidelity seeks its day in court. The district court decision imposed the draconian result of denying International Fidelity an opportunity to defend itself against Drill South's lawsuit. There has never been

an adjudication on the merits of Drill South's claims. Under the district court's and Eleventh Circuit's decisions, a surety would never have the opportunity to assert its unique surety defenses if the surety's bond principal failed to appear and judgment was entered against the bond principal. This is contrary to the Fifth Amendment's guarantee of due process.

II. The Eleventh Circuit Misinterpreted And Misapplied The Law And Its Decision Creates A Conflict Within The Eleventh Circuit And Other Circuits.

It is unclear from the Eleventh Circuit's opinion whether the Court based its ruling on Alabama law, federal common law or both. Under either Alabama law or federal common law, however, the Eleventh Circuit's decision is in conflict with other cases in that Circuit and in other Circuits.

A. The Eleventh Circuit's Decision Directly Conflicts With Other Cases Concerning Alabama Law on Preclusion.

This matter arises out of a claim under a payment bond issued pursuant to the Miller Act. As the question of the preclusive effect of the judgement against Enviro-Group does not involve the construction of the Miller Act, to which federal law would apply, Alabama law should govern. United States ex rel. Riley v. Diran Co., 597 F.2d 446, 447 n.1 (5th Cir. 1979); United States ex rel. Aucoin Elec. Supply Co. v. Safeco Ins. Co. of Am., 555 F.2d 535, 541 (5th Cir. 1977).

In United States v. Maryland Casualty Co., 204 F.2d 912 (5th Cir. 1953) the former Fifth Circuit held that a prior judgment obtained against a bond principal is *not* admissible against its surety:

> A careful consideration of the record and of the law of Alabama convinces us that the judgment appealed from was correctly entered for the reasons stated below, (1) that under the settled law of Alabama the judgments were not admissible in evidence; and (2) that if they were admissible, they were, without more, insufficient to furnish a basis for a judgment against the sureties.

204 F.2d at 915. Maryland Casualty was based upon the court's application of Alabama law and concluded that a prior judgment is binding on the surety only in cases where the contract of the surety is an undertaking to be bound by the result of legal proceedings against the principal. 204 F.2d at 915, citing Fireman's Ins. Co. v. McMillan 29 Ala.147, 1856 WL 346 (1856). Because the construction bonds at issue in Maryland Casualty were not undertakings to be bound by a judgment, the court affirmed the district court's entry of judgment in favor of the sureties. Id. at 913-15. Likewise, in this case the bond did not condition International Fidelity's liability upon a judgment being entered against Enviro-Group, but upon Enviro-Group's failure to make payment to subcontractors or suppliers.[2/]

[2/] More recently, the Ninth Circuit Court of Appeals echoed the holding of Maryland Casualty finding that a default judgment against a principal was binding in an action against the surety where the bond was issued specifically to pay any judgment for damages against the principal. Axess International, Ltd. v. Intercargo Insurance Co., 183 F.3d 935, 940 (9th Cir 1999). Axess International also cites the general and well-recognized rule that "a default judgment obtained by an obligee against a principal obligor does not have preclusive effect in a subsequent action against a secondary obligor." Id. at 940.

The Eleventh Circuit's decision in this case, however, overlooks and ignores Maryland Casualty, even though the underlying matter arises in Alabama and the application of Alabama law was recognized by the district court. Maryland Casualty specifically states that Alabama law should be applied to the preclusive claim against a surety. 204 F.2d at 915. See Rouse Construction, Inc. v. Transamerica Insurance Co., 750 F.2d 1492, 1493 (11th Cir. 1985) ("effect of a judgment against a principal in a later suit against the surety is a substantive matter to be determined by state law. . . "). Not only did the Eleventh Circuit ignore Maryland Casualty, it misstated Alabama law and misapplied Fireman's Ins. Co. v. McMillan, a case relied upon by Maryland Casualty. App. 7a at n. 5.

Fireman's Ins. is cited by Maryland Casualty and in the Eleventh Circuit's decision. App. 7a at n. 5. Each, however, arrive at different conclusions. The Eleventh Circuit in this case erroneously interprets Fireman's Ins. to stand for the proposition that "a surety is conclusively bound by a default judgment against its principal." Id. That is not the case. Fireman's Ins. states that "the true rule is that a recovery against a principal cannot be used as evidence to charge a surety." 29 Ala.147, 1856 WL 346, *13; Maryland Casualty 204 F.2d at 915.

Other decisions of the Eleventh Circuit are consistent with the general rule[3/] set forth in Maryland

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[3/] The Eleventh Circuit refers to the "general rule" as one whereby a surety is bound by any judgment, by default or otherwise, against its principal. App. 4a. The "general rule" is more correctly stated that the surety is *not* bound by any default judgment against its principal. See Conclusiveness and Effect, Upon Surety, of Default or Consent Judgment Against Principal, 59 A.L.R. 2d 752 (1958) ("The *general rule* that sureties are not bound by

Casualty. In Rouse Construction, Inc., the Eleventh Circuit, applying Georgia law, also concluded that a surety was not bound by a default judgment against its principal, even where the surety had notice of the prior action. 750 F.2d at 1493-94. See also, Seaboard Surety Co. v. Westwood Lake, Inc., 277 F.2d 397, 404 (5th Cir. 1960) (citing Maryland Casualty as holding that effect of a prior judgment matter of state law and that, in Alabama, a judgment against the principal is not binding on the surety at all, except under certain conditions not present in this case).

In the Drill South opinion, the Eleventh Circuit reasons that other courts have concluded that a surety is bound by a judgment entered against its principal whether the principal and surety are sued in the same action or in separate actions. App. 9a at n 7. In each of the cases relied upon by Eleventh Circuit, however, the bond claim proceeded to trial on the merits against the surety alone, despite the default of the principal in the same action. This is consistent with the district court's comments. See First Mobile Home Corp. v. Little, 298 So.2d 676, 677 (Miss. 1974) (surety answered, default entered against principal, but still, "the chancellor *heard the evidence introduced by* all complainants and *the answering parties*") (emphasis added); Massachusetts Bonding & Ins. Co. v. Central Finance Co., 237 P.2d 1079, 1080 (Col. 1951) (surety

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judgments against their principal unless the undertaking so provides was applied to a default judgment against the principal in McPhetridge v. Smith, 101 Cal. App. 122, 281 P. 419 (1929), an action by the owner of real estate against his brokers and their sureties") (emphasis added). See also Restatement (Third) of Suretyship and Guaranty § 67(3) (a default judgment obtained by an obligee against a principal obligor does not have preclusive effect in a subsequent action against the secondary obligor).

answered, default entered against principal, but still, "*[t]rial was had to the court*") (emphasis added); Home Ins. Co. of New York v. Savage, 103 S.W.2d 900, 901 (Mo. Ct. App. 1937) (default entered against principal, sureties answered, but still, "*trial was had as to them*") (emphasis added); Charleston & Western Carolina Ry. Co., v. Robert G. Lassiter & Co., 179 S.E. 879, 880 (N.C. 1935) (judgment by default was rendered against principal, surety answered, but still, "the cause was thereupon transferred to the civil issue docket *for trial of the issues joined*") (emphasis added). In this case, the merits of International Fidelity's defenses (as well as Drill South's claims) have never been adjudicated, or even considered, despite the fact that International Fidelity joined issue against Drill South, was actively litigating the case, and was prepared to proceed to trial.

The bond at issue in this case, like the bond in Maryland Casualty, is not an undertaking to be bound by a judgment. The Eleventh Circuit's decision misapplies Alabama law and its dismissal of International Fidelity's claims based on the default judgment entered against Enviro-Group is in conflict with other decisions of that Circuit.

B. The Eleventh Circuit's Decision Is In Conflict With Decisions In The Ninth Circuit.

The Eleventh Circuit's decision in this case is in conflict with decisions in the Ninth Circuit holding that, absent facts not in issue in this case, a default judgment entered against a surety's bond principal is not binding on a surety.

In United States v. Hayes, 369 F.2d 671 (9th Cir. 1966) the Court, relying on United States v. Maryland Casualty. Co., held that a judgment rendered against a principal "cannot and should not, of itself alone, constitute

prima facie evidence of the amount of the guarantor's obligation." Id. at 675. More recently, the Ninth Circuit has again echoed the general rule that a surety is not bound by a default judgment rendered against its principal *unless* the surtey's obligation is created by an undertaking to be bound by the result of legal proceedings against the principal, *i.e.*, a judgment bond. Axess International, Ltd. v. Intercargo Insurance Co., 183 F.3d 935, 940 (9th Cir. 1999).

The Eleventh Circuit's decision blurs the distinction recognized by the Ninth Circuit between the general rule that a surety is not bound by a default entered against its principal and those cases in which the surety's undertaking was based on a contract to be bound by a judgment rendered against its principal (*i.e.* a judgment bond). The Eleventh Circuit's decision in this case stands in stark contrast to and creates a conflict with the decisions of the Ninth Circuit. It also blurs the distinction between suretyship and insurance and is contrary to generally accepted commercial surety practices

C. The Eleventh Circuit's Decision Directly Conflicts With Other Decisions In The Former Fifth Circuit Regarding Federal Common Law on Preclusion.

The Eleventh Circuit's decision relies on Lake County ex rel. Baxley v. Massachusetts Bonding & Ins. Co., 75 F.2d 6 (5th Cir. 1935) to support the conclusion that "the general rule that has emerged is that a surety is bound by any judgment against its principal, *default or otherwise*, when the surety had full knowledge of the action against the principal and an opportunity to defend."[4] App. 5a.

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[4] The Panel also cites U.S. ex rel. Vigilanti v. Pfeiffer-Neumeyer Constr. Corp., 25 F. Supp. 403 (E.D.N.Y. 1938) in support of that proposition, but later

Lake County, however, was decided before Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), and therefore constitutes the application of federal common law. Lake County does not purport to enunciate Alabama law. If, by citing Lake County, the Eleventh Circuit intended to hold that the default judgment against Enviro-Group conclusively binds International Fidelity upon federal common law, then the decision is in conflict with Bush v. Balfour Beatty Bahamas, Ltd. (In re Bush), 62 F.3d 1319 (11th Cir. 1995). In that case, the Eleventh Circuit, rejecting the proposition that a default judgment should usually be given preclusive effect, said:

> The general federal rule, however, is to the contrary. Ordinarily a default judgment will not support the application of collateral estoppel because '[i]n the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated." Restatement (Second) of Judgments § 68, cmt. d, e (1942).

Id. at 1323. (internal footnote omitted).

Bush involved the issue of whether a prior federal judgment, *by default*, for fraud against a bankruptcy debtor bound that debtor in a later adversary proceeding in bankruptcy to deny the dischargeability of the judgment, clearly a federal question. Because the judgment in the prior case was entered as a sanction for the dilatory and deliberately constructive conduct of the debtor who substantially participated in the action before failing to produce trial exhibits and appear for a deposition, this Court found that the prior judgment did not present the ordinary case and was not subject to the general rule. Id. at 1324-25. Nothing in Lake County suggests that the

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cites that same case as supporting International Fidelity's position. App. 8a.

judgment against the principal, to which the former Fifth Circuit accorded preclusive effect against the surety, was rendered by default and that therefore the court there intended to depart from the general rule that a default *judgment does not constitute* an adjudication on the merits and therefore cannot be accorded any preclusive effect.

D. The Eleventh Circuit Misapplied Lake County ex rel. Baxley v. Massachusetts Bonding & Ins. Co., 75 F.2d 6 (5th Cir. 1935) And Has Created A Conflict in the Circuit.

In U.S. Fidelity & Guaranty Co. v. Hendry Corp., 391 F.2d 13 (5th Cir. 1968), the former Fifth Circuit viewed its holding in Lake County as one based upon the "doctrine of estoppel against the surety [and] rests on the principle that a surety with knowledge of a suit against the principal has 'full opportunity to defend' the suit and to protect ***its*** rights." 391 F. 2d at 17 (emphasis added). Unlike the interpretation of Lake County by the Eleventh Circuit in this case, Hendry does not impose an obligation on the surety to defend its principal, but only that the surety defend itself. Id. In Hendry, the court declined to apply estoppel against the surety by reason of a prior judgment against the principal rendered by a state court because of the Miller Act's jurisdictional requirements. Thus, even assuming *arguendo* that Lake County could be read to support the proposition that a surety should be bound by a default judgment against the principal where the surety had knowledge of the action and opportunity to defend, the Eleventh Circuit's decision misapplied Lake County and ignored the reasoning of U.S. ex rel. Vigilanit v. Pfeiffer-Neumeyer Constr. Corp., 25 F. Supp. 403 (E.D.N.Y. 1938), by applying that proposition to this case.

The reasoning of Lake County and Vigilanti is entirely consistent, although the facts diverge, *i.e.*, in Vigilanti default judgment was rendered against the principal in the same action in which the surety was

actively defending the claim, while in Lake County the judgment was entered in a prior proceeding to which the surety was not a party. That difference is critical as the court in Vigilanti, which the Eleventh Circuit's decision cites as authority ***supporting*** its ruling made clear (App 5a):

> A surety cannot stand idly by with full knowledge of an action pending against its principal, permit a judgment to be taken against the principal, and later on, when an action is brought upon its bond, require the plaintiff to retry his case. This would result in two trials of the same issue .... This case is readily distinguishable from the cases which have been cited in this opinion [including Lake County]. Here a judgment of default was entered against the principal in this action which the surety defended. The surety was not responsible for the principal defaulting in this action. Upon the trial of this action it was entitled to offer its defenses. It was not in any wise [sic] bound by the default judgment obtained against the principal. ... This is not a case in which the sureties had the opportunity to defend, and failed to defend, an action which was brought against their principal. This is not the ordinary case in which a judgment has first been obtained against the principal, and a second action is brought against the sureties to compel its payment. In such case the first judgment is held to be evidence against the sureties, for the reason that it is the result of a judicial investigation in which the sureties might have availed themselves of the opportunity to make a defense for their principal. Here the action is brought in the first instance against the principal and his two sureties. The principal ... made no appearance in the action. Judgment by

> default was rendered against him. But at the same time that this was done the sureties were in court in the same action with their answer to the complaint denying the assignment of the claims to the bank, and denying, so far as the unassigned claims were concerned, their own, and incidentally their principal's liability upon the bond. Upon what principle can it be said that the silence of the contractor -- his failure to make answer -- can be shown in evidence against the sureties upon the very issues which they had raised both for him and themselves upon their denial that certain of these claims had been assigned to the bank?
>
> Id. at 404-05.

The Eleventh Circuit's misapplication of Lake County provides the claimant with a windfall rendering judgment in its favor without ever requiring it to prove its case against any party.[5/] Additionally, the decision leaves the law greatly unsettled for the surety industry.

[5/] The Eleventh Circuit adopted the district court's view that it would be an anomaly to have one result if the surety was not a party to the action in which a judgment was rendered and another result if the surety was a party to the action. App. 8a-9a. The Eleventh Circuit, however, failed to distinguish the facts of this case where the surety is defending the claim. The Eleventh Circuit's position in this case, as well as that of the district court, can only be sustained if one places an obligation upon the surety to defend the bond principal, like an insurer defending its insured. This blurs the distinction between insurance and suretyship.

III. The Eleventh Circuit Failed to Recognize the Distinctions Between Suretyship and Insurance and Imposes an Obligation on Sureties That Unsettles Established Commercial Practices.

Suretyship is fundamentally different from insurance. See Pearlman v. Reliance Ins. Co., 371 U.S. 132, 140 fn.19 (1962) ("the usual view, grounded in commercial practice, [is] that suretyship is not insurance"); American Manufacturing Mutual Insurance Company v. Tison Hog Market, Inc., 182 F.3d 1284, 1289-90 (11th Cir. 1999) (reversing district court's application of Georgia insurance law to surety bonds); Craft v. Standard Accident Ins. Co., 123 So. 271, 272 (Ala. 1929) (recognizing distinctions between contract of suretyship and contract of indemnity). Here, the Eleventh Circuit failed to recognize the distinctions between suretyship, in which the surety has no obligation to defend its principal, and insurance, in which an insurer has a contractual obligation to defend its insured. The decision appears to impose an obligation upon the surety to defend its principal inconsistent with standard commercial practices in suretyship.

A contract of suretyship imposes no obligation upon the surety to defend its principal. Park v. Ensign, 71 P. 230, 231 (Kan. 1903); Indiana Univ. v. Indiana Bonding & Surety Co., 416 N.E.2d 1275, 1284 fn. 6. (Ind. Ct. App. 1981); Western World Ins. Co. v. Travelers Indemn. Co., 358 So.2d 602, 604 (Fla. Ct. App. 1978) ("the statutory bond issued by [the surety] does not impose any duty upon the surety to defend its principal in the event suit is brought against the principal"). Unlike a contract of suretyship, the terms of an ***insurance policy*** govern an insurer's obligation

to defend its insured and often requires the insurer to defend the insured. See Universal Underwriters Ins. Co. v. Stokes Chevrolet, Inc., 990 F.2d 598, 605 (11th Cir. 1993); Western World Ins. Co., 358 So. 2d at 604. Moreover, a surety is entitled to indemnification from its principal. Id. at 603; Craft, 123 So. at 272. The surety is entitled to indemnification because, unlike insurance, the surety is lending its credit to the principal. See Western World Ins. Co., 358 So.2d at 604. By contrast, an insurer is not entitled to indemnification from its insured. Id.

The Eleventh Circuit's decision in this case mistakes a surety's right to compromise a claim with an insurer's obligation to defend its insured: "[w]e do not believe that there is anything unusual about an insurance company or surety defending a principal or insured against suits by third-parties." App. 8a at n.6.

The petition for writ should be granted to remedy the Eleventh Circuit's fundamental error in failing to distinguish between suretyship and insurance. The decision can also disrupt generally accepted commercial practices in the surety industry and should therefore be reversed.

CONCLUSION

This case presents a question of federal law that is of substantial importance - whether a Miller Act surety is denied due process when it is precluded from defending its interests by operation of a default judgment entered against its bonded principal in the same lawsuit in which the surety is actively defending. The writ should therefore be granted to allow this Honorable Court to reconcile the conflict that exists between the decision of the Eleventh Circuit in this

case and those of the Ninth Circuit in Hayes and Access International. Finally, the writ should also be granted to clarify for the Circuits the rights and obligations of a surety.

Accordingly, Petitioner International Fidelity Insurance Company respectfully requests that this Petition for Certiorari be granted.

Respectfully submitted,

NEIL L. HENRICHSEN
Counsel of Record
HENRICHSEN SIEGEL, P.L.L.C.
1850 M Street, N.W. Suite 250
Washington, D.C. 20036
(202) 293-7766
Attorney for Petitioner

Of Counsel:
LEWIS S. WIENER
HENRICHSEN SIEGEL, P.L.L.C.

Dated: March 7, 2001

No.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 2000

INTERNATIONAL FIDELITY INSURANCE CO., INC.,
Petitioner,

v.

DRILL SOUTH, INC.
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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United States Court of Appeals,
Eleventh Circuit.

DRILL SOUTH, INC.,
Plaintiff-Appellee-Cross-Appellant,
v.
INTERNATIONAL FIDELITY INS. CO.,
Defendant-Appellant-Cross-Appellee.

Drill South, Inc.,
Plaintiff-Counter Defendant-Appellee,
v.
International Fidelity Ins. Co.,
Defendant-Counter Claimant-Appellant.

Nos. 99-6100, 99-13590.

Dec. 7, 2000.

Rehearing and Suggestion for Rehearing En Banc Denied Feb. 6, 2001.

Joel Scott Dickens, Starnes & Atchison, Birmingham, AL, Lorraine M. Magee, Neil L. Henrichsen, Mitterhoff, Henrichsen & Stewart, Washington, DC, for International Fidelity Ins., Co.

Peter M. Crofton, Robert O. Fleming, Jr., Smith & Fleming, Atlanta, GA, for Drill South, Inc.

Appeals from the United States District Court for the Northern District of Alabama.

Before COX, BLACK and FAY, Circuit Judges.

PER CURIAM:

This is a Miller Act payment bond action arising from a federal construction project ("the Project") at the Redstone Arsenal in Huntsville, Alabama. International Fidelity Insurance Co. ("International Fidelity"), a Miller Act surety, argues on appeal that the district court erred by granting judgment against it solely on the basis of a default judgment entered against its principal, that the district court lacked personal jurisdiction over its principal, and that the district court erred by granting an award of attorneys' fees. After considering the parties' arguments and the record in this matter, we affirm the rulings of the district court.

In 1995, Enviro-Group, Inc. ("Enviro-Group"), an Indiana-based company, contracted with the United States to perform construction work on the Project. International Fidelity issued payment and performance bonds on behalf of Enviro-Group, as required by the Miller Act. Drill South, Inc. ("Drill South") entered into a subcontract with Enviro-Group to perform certain drilling work, and, in turn, contracted with Miller Drilling Co., Inc. ("Miller Drilling") to perform work on the project.

Enviro-Group defaulted on the contract, and Miller Drilling brought suit for unpaid invoices against Drill South, Enviro-Group, and International Fidelity pursuant to the Miller Act and Alabama law.[1/] Drill South then cross-claimed against International Fidelity and Enviro-Group. International Fidelity answered the cross-claim of Drill

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[1/] On May 27, 1997, Miller Drilling's claims were dismissed due to a settlement.

South and itself cross-claimed against Drill South and Enviro-Group. On February 20, 1997, Drill South filed a Motion for Default Judgment against Enviro-Group. In response to Drill South's Motion for Default Judgment, International Fidelity stated that it took no position on a default judgment against its principal Enviro-Group, provided that the default judgment was not deemed binding on International Fidelity. Enviro-Group failed to respond, and the district court entered default judgment against Enviro-Group in favor of Drill South on April 7, 1997. Several months after it entered default judgment against Enviro-Group and while International Fidelity and Drill South had cross motions for summary judgment pending, the district court concluded that International Fidelity, as surety for Enviro-Group, was bound by the default judgment against Enviro-Group, and that the pending cross motions for summary judgment were therefore moot. The district court entered Final Judgment against International Fidelity on September 5, 1997. On January 27, 1999, the district court granted Drill South's Motion for Attorneys' Fees and amended the September 5, 1997 Final Judgment to reflect the same. International Fidelity timely filed a notice of appeal from that Judgment, and Drill South timely filed a notice of cross- appeal. While that appeal was pending, International Fidelity filed a motion with the district court to set aside the judgment pursuant to Fed.R.Civ.P. 60(b)(4), arguing that the judgment was void for lack of jurisdiction. The district court denied the Rule 60(b)(4) motion on September 1, 1999, and International Fidelity timely filed a notice of appeal from that order as well. On November 24, 1999, this Court consolidated the two appeals.

On appeal, International Fidelity argues that the District Court erred by granting judgment in favor of Drill South solely on the basis that a default judgment had been entered in the same case on such claim against International Fidelity's principal, Enviro-Group. Next, International Fidelity argues that the district court erred in granting judgment against International Fidelity on the basis of the default judgment because the district court lacked personal jurisdiction over Enviro-Group. Finally, International Fidelity argues that the district court erred by granting Drill South an award of attorneys' fees and costs, and Drill South cross-appeals, challenging the amount of attorneys' fees to which the district court determined that it was entitled. For the reasons set forth more fully below, we find no error in the district court's orders of September 5, 1997, January 27, 1999, and September 1, 1999.

We turn first to International Fidelity's argument that it cannot be bound by the judgment against Enviro-Group because default judgments against a bond principal are not binding on a co-defendant surety actively defending in the same action. Whether the district court properly held that International Fidelity was preclusively bound by the default judgment against its principal is a question of law, subject to plenary review. *See McDonald v. Hillsborough County School Board*, 821 F.2d 1563, 1564 (11th Cir.1987). Substantial dispute exists in the law as to whether a default judgment rendered against a principal is binding upon the principal's surety. Nevertheless, the general rule that has emerged is that a surety is bound by any judgment against its principal, default or otherwise, when the surety had full knowledge of the action against the principal and an opportunity to defend. *See Lake County ex rel. Baxley v. Massachusetts Bonding & Ins. Co.*, 75 F.2d 6, 8 (5th

Cir.1935)[2] ("[w]here it appears that the judgment against the [principal] was obtained in a suit of which the surety had full knowledge, and which it had full opportunity to defend, the judgment therein is not only evidence, but conclusive evidence, against every defense except that of fraud and collusion in obtaining it."); *United States ex rel. Vigilanti v. Pfeiffer-Neumeyer Const. Corp.*, 25 F.Supp. 403, 404 (E.D.N.Y.1938).

In this action, it is clear from the record that International Fidelity had full knowledge of the potential for the default judgment against Enviro-Group and possessed numerous opportunities to defend the ultimate judgment. The record is replete with instances in which the district court afforded International Fidelity both notice and opportunity to step in and defend the merits of Drill South's claims against Enviro-Group and the extent of its liability.[3] It is also clear

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[2] Under *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*), this court is bound by cases decided by the former Fifth Circuit before October 1, 1981.

[3] After Drill South filed its Motion for Default Judgment against Enviro-Group, the district court ordered "any party wishing to be heard on the Motion" to submit a response. Despite the district court's order, International Fidelity chose not to defend Enviro-Group against the default judgment and offered no evidence on Enviro-Group's liability, apparently under the belief that such judgment would not be binding on it. Next, the district court held a hearing in April of 1997 for arguments on "the issues of the entry of default judgment against Enviro-Group, any damages arising therefrom, and whether

to this Court that International Fidelity had the legal right to step in and defend Enviro- Group against the default judgment at every stage of the proceedings pursuant to its Agreement of Indemnity with Enviro-Group. Under the terms of the Agreement, International Fidelity was designated Enviro-Group's "attorney-in- fact", giving International Fidelity the "right to adjust, settle, or compromise any claim, demand, suit or judgment upon the [payment bond]." Agreement of Indemnity, ¶ 13.[4/] We agree

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such default judgment is binding on International Fidelity as a surety." International Fidelity appeared at the hearing and denied its liability for the default judgment, but failed to step in and defend the merits of the judgment or damages. The district court also accepted a brief from International Fidelity, addressing whether International Fidelity should be bound by the judgment against its principal. Finally, the district court provided International Fidelity yet another opportunity to defend against the binding effect of the default judgment when it allowed International Fidelity to argue the issue before the court at a motion docket on August 29, 1997.

[4/] The Agreement of Indemnity appoints International Fidelity as the attorney-in-fact for Enviro-Group as follows:

> [Enviro-Group] hereby irrevocably nominate[s], constitute[s], appoint[s] and designate[s] [International Fidelity] as their attorney-in-fact with the right, but not the obligation, ... in the name of [Enviro-Group] to make, execute, and deliver any and all additional or other assignments, documents,

with the district court that because International Fidelity had the right, and therefore the opportunity, to defend Enviro-Group as its surety and attorney-in-fact, International Fidelity should not be permitted to stand back and allow a judgment to be taken setting the amount of recovery against its principal without similarly being bound by the judgment.[5/]

To the extent that International Fidelity argues that it had no obligation to defend the action against Enviro-Group, we are not persuaded. We believe the issue is not whether the Agreement of Indemnity imposed an obligation on International Fidelity to defend Enviro-Group, but whether it conferred a right to defend. The law requires only that a surety have notice and an opportunity to defend before it is

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> or papers deemed necessary and proper by [International Fidelity] in order to give ... the full protection intended to be herein given to [International Fidelity] under all other provisions of this Agreement. [Enviro-Group] hereby ratify[ies], and confirm[s] all acts and actions taken and done by [International Fidelity] as such attorney-in- fact. Agreement of Indemnity at ¶ 18.

[5/] Our decision that International Fidelity is bound by the default judgment against Enviro-Group is the same under Alabama substantive law. Under Alabama law, a surety is conclusively bound by a default judgment against a principal if it is a privy of the principal or if it is a party to the suit in which judgment is rendered. *See Firemen's Ins. Co. v. McMillan*, 29 Ala. 147, 167-68 (Ala.1856).

bound by a judgment against its principal. We believe International Fidelity had this right and opportunity, and simply chose, for whatever reason, not to exercise its right.[6/]

International Fidelity argues, however, that when a surety and principal are sued in the same action, and the surety answers and defends on its own behalf, the surety is not bound by a default judgment entered against the surety's principal. Although we recognize the existence of authority supporting International Fidelity's position, those cases are not binding on this Court; nor do we find their reasoning persuasive. *See United States ex. rel. Fidelity Nat. Bank v. Rundle*, 107 F. 227, 229 (9th Cir.1901); *Pfeiffer-Neumeyer Const. Corp.*, 25 F.Supp. at 405 (principal's silence and failure to appear cannot be shown in evidence against sureties actively defending in same action); *North Jersey Sav. and Loan Assn. v. Wright, Egan, & Assoc.*, 1987 WL 5259 (unpublished opinion) (E.D.Pa.1987)(default judgment against principal is not binding on surety defending in same action); *Gearhart v. Pierce Enterprises, Inc.*, 105 Nev. 517, 779 P.2d 93, 95 (1989)(default judgment against principal not binding on surety where

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[6/] Contrary to International Fidelity's argument, the simple fact that International Fidelity had asserted a cross-claim against Enviro-Group does not affect International Fidelity's "right" to step in and defend Enviro-Group as its attorney-in-fact. We do not believe that there is anything unusual about an insurance company or surety defending a principal or insured against suits by third parties, while simultaneously maintaining an action against the insured or principal, or taking such action under a "reservation of rights."

surety was not responsible for principal's conduct causing default and had not assumed principal's legal defense, notwithstanding surety's participation in suit as principal's co-defendant).

We believe that the general rule that a surety is bound by a judgment entered against its principal when the surety had both notice and opportunity to defend applies whether the principal and surety are sued in the same action or in separate actions.[7/] As was stated by the district court in its September 5, 1997 Memorandum of Opinion:

> It would be an anomaly to conclude that a surety can be held liable under the general rule for standing idly by while its principal suffers an adverse judgment when the judgment is rendered in an action where the surety is not a party, and in the same breadth conclude that the surety can stand idly by, without liability, and allow a default judgment to be rendered against its principal merely because the surety was a co-defendant to the action. In the

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[7/] Other courts have reached this conclusion under similar facts. *See First Mobile Home Corp. v. Little*, 298 So.2d 676, 682 (Miss.1974)(surety bound by default judgment against principal when sued in same suit because had same right to defend as its principal); *Massachusetts Bonding & Ins. Co. v. Central Finance Corp.*, 124 Colo. 379, 237 P.2d 1079 (1951)(default judgment against principal is conclusive on surety); *Home Ins. Co. of New York v. Savage*, 231 Mo.App. 569, 103 S.W.2d 900, 901-02 (1937); *Charleston & W.C. Ry. Co. v. Lassiter & Co.*, 208 N.C. 209, 179 S.E. 879, 881-82 (1935).

> former case, the surety is afforded much less opportunity to defend its interests than in the latter, where it is already a party, has full knowledge of the proceedings, and can freely oppose the judgment against its principal.

Accordingly, we find no error in the district court's determination that International Fidelity is bound by the default judgment taken in the same action against its principal, Enviro-Group.[8/]

We turn now to International Fidelity's argument that the district court erred in granting judgment against International Fidelity on the basis of the default judgment

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[8/] Moreover, we agree with the district court that the Supreme Court's holding in *Frow v. De La Vega*, 15 Wall. 552, 82 U.S. 552, 21 L.Ed. 60 (1872), is inapplicable to this case in light of the conclusion that International Fidelity is conclusively bound by the default judgment against Enviro-Group. *Frow* held that where multiple defendants are jointly liable, it would be "incongruous" for judgment to be entered against a defaulting defendant prior to the decision on the merits as to the remaining defendants. *See id.* at 554. Nevertheless, *Frow* has been interpreted to apply only when there is a risk of inconsistent adjudications. *See In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1257-58 (7th Cir.1980). *See also* Wright, Miller, & Kane, Federal Practice and Procedure; Civil 2d § 2690 (1983-1997). Because we have determined that International Fidelity was conclusively bound by the default judgment entered against its principal, there was no risk of inconsistent adjudications and the rationale behind *Frow* is not implicated.

against Enviro-Group because the district court lacked personal jurisdiction over Enviro-Group. International Fidelity argues that Enviro- Group was never properly served in this action, and therefore the district court never obtained personal jurisdiction over Enviro-Group. As such, International Fidelity believes that the default judgment entered against Enviro-Group is void and cannot serve as a basis to bind International Fidelity.[2/]

The summons issued for Enviro-Group states that it is directed to: "Robert G. Woodward, Jr., President of Enviro-Group, Inc." Mr. Woodward received the summons via certified mail and accepted and signed for it in December 1996. International Fidelity complains that this amounted to service on Mr. Woodward in his individual capacity and is insufficient to confer personal jurisdiction over Enviro-Group. We disagree. Under both the Federal Rules and Alabama Rules of Civil Procedure, we believe the summons described above was sufficient to confer

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[2/] Although we do not decide the issue today, it is not entirely clear that International Fidelity has the right to raise the argument that the district court lacked personal jurisdiction over Enviro-Group. Lack of personal jurisdiction is arguably a personal defense that can only be raised by the party over whom jurisdiction is lacking. *See Leroy v. Great Western United Corp.*, 443 U.S. 173, 180, 99 S.Ct. 2710, 2715, 61 L.Ed.2d 464 (1979); *Hardaway Co. v. Amwest Surety Ins. Co.*, 15 F.3d 172, 174 (11th Cir.1994)(surety may assert all defenses that would be available to principal with the exception of personal defenses).

personal jurisdiction over Enviro-Group.[10/]

The Federal Rules of Civil Procedure contemplate that a court may have personal jurisdiction over a defendant served despite imperfect service of process. *See Sanderford v. Prudential Ins. Co. of America*, 902 F.2d 897 (11th Cir.1990). Thus, even a finding that the summons served upon Enviro-Group through Mr. Woodward was technically defective would not necessarily mean that the district court lacked personal jurisdiction over Enviro-Group or that the default judgment against Enviro-Group is void. If a summons is in substantial compliance with the Federal Rules and a defendant has not been prejudiced by a defect in the summons, a defendant waives the insufficiency of process defense by not asserting it prior to the entry of default judgment. *See id.* at 900. There is nothing in the record to suggest that either Enviro-Group or International Fidelity lacked notice that Drill South's claims were against Enviro-Group rather than Robert Woodward, or that either was in any way prejudiced by the allegedly "defective" summons.[11/] As such, the

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[10/] Both the Alabama Rules of Civil Procedure and the Federal Rules of Civil Procedure contemplate service upon a corporation through its "officers" or "agents." *See* Fed.R.Civ.P. 4(h)(1); Ala. R. Civ. P. 4(c)(6).

[11/] The summons at issue indicated that it was a cross-claim summons and was accompanied by a cross-claim which identified Enviro-Group, not Robert Woodward, as the cross-defendant. The case caption also identified Enviro-Group as the defendant. In addition, the summons warned that a default might be taken if

district court did not err in concluding that Enviro- Group was served in a manner substantially complying with Fed. R. Civ. P. 4 or in its decision that it had personal jurisdiction over Enviro-Group.

Contrary to International Fidelity's argument, the result is not different under the Alabama Rules of Civil Procedure. International Fidelity argues that service requirements under Alabama law are more stringent than the Federal Rules and that the district court in this matter improperly presumed that Robert Woodward was an agent of Enviro-Group who could accept service on behalf of the company.

The 1992 Committee Comments to Rule 4 of the Alabama Rules of Civil Procedure caution that no presumption of agency should be indulged in with respect to service and that "courts should be vigilant to protect the rights of defendants when default judgments are entered on the basis of service upon an agent of a defendant." In addition, the Comments provide that "the court should be satisfied that the person upon whom service was attempted was in fact the authorized agent of the defendant before refusing to grant relief from a default judgment." *See also Hoffman et al. v. Alabama Distillery & Feeding Co.*, 124 Ala. 542, 27 So. 485 (1900)(indicating that under Alabama law, there must be some proof of proper connection between the individual served and the corporation in order to sustain a judgment against that corporation). We believe that the district court did properly satisfy itself that Robert Woodward was authorized to accept service on behalf of

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Enviro-Group failed to appear.

Enviro-Group. The district court accepted evidentiary submissions from the parties on the issue and ultimately determined that Mr. Woodward was an officer, agent, and owner of Enviro-Group at the time of service. The district court's determination that Robert Woodward could properly accept service on behalf of Enviro-Group is amply supported by the record and we find no error.[12/]

Finally, we turn to the parties' arguments pertaining to attorneys' fees. International Fidelity argues that the district court erred in granting Drill South an award of fees and costs because Drill South did not plead its entitlement to fees in its cross-claim against International Fidelity. Drill South cross-appeals, arguing that the district court properly awarded it fees, but should be required to recalculate the amount of fees due to the district court's use of an improper standard in determining the amount of fees to which Drill

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[12/] Moreover, like the district court, we believe that International Fidelity's argument that service on Enviro-Group was improper and that no personal jurisdiction attached should have been raised long ago. International Fidelity knew or should have known of the alleged "defects" in the summons no later than February 18, 1997, when Drill South's Motion for Default Judgment, with a copy of the summons attached, was served on International Fidelity. Despite having received a copy of the summons in February 1997, International Fidelity did not raise its defective service argument until twenty-six months after the entry of default judgment against Enviro-Group; twenty-one months after the entry of final judgment against International Fidelity; and five months after entry of the amended final judgment.

South was entitled, the district court's failure to consider International Fidelity's "Stalingrad Defense" tactics, and the district court's erroneous findings of fact concerning the reasonableness of the hours Drill South expended in this matter.

District courts have broad discretion in awarding attorneys' fees, and an award of such fees will normally be set aside only for abuse of discretion. *See American Civil Liberties Union of Georgia v. Barnes*, 168 F.3d 423, 427 (11th Cir.1999); *In re Hillsborough Holdings Corp.*, 127 F.3d 1398, 1401 (11th Cir.1997); *ARP Films, Inc. v. Marvel Entertainment Group, Inc.*, 952 F.2d 643, 651 (2d Cir.1991); *Lerman v. Flynt Distrib. Co.*, 789 F.2d 164, 166 (2d Cir.), *cert. denied*, 479 U.S. 932, 107 S.Ct. 404, 93 L.Ed.2d 357 (1986). "An abuse of discretion occurs if the judge fails to apply the proper legal standard or to follow proper procedures in making the determination or bases an award [or a denial] upon findings of fact that are clearly erroneous." *United States v. Gilbert*, 198 F.3d 1293, 1298 (11th Cir.1999).

After considering the parties arguments and the record, we do not believe that the district court abused its discretion in its decision to award Drill South fees despite its apparent failure to plead its entitlement to fees in its cross-claim against International Fidelity. The pre-trial order in this action clearly stated Drill South's intent to recover attorneys' fees from International Fidelity.[13/] See

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13/ Moreover, that Drill South did not specifically plead its entitlement to fees in its cross-claim against International Fidelity is not necessarily determinative. We

State Treasurer of the State of Michigan v. Barry, 168 F.3d 8, 9-10 (11th Cir.1999)(pretrial order supercedes prior pleadings); *Insurance Co. of North America v. M/V Ocean Lynx*, 901 F.2d 934, 941 (11th Cir.1990). Nor do we find that the district court erred in its determination of the proper amount of fees to be awarded to Drill South. Accordingly, we affirm the district court's decisions pertaining to attorneys' fees in all respects.

AFFIRMED.

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have held under similar facts that a district court has discretion to award the prevailing party attorneys' fees pursuant to a contractual provision, despite that party's failure to plead fees in its pleadings. *See Capital Asset Research Corp. v. Finnegan*, 216 F.3d 1268, 1270-72 (*citing Engel v. Teleprompter Corp.*, 732 F.2d 1238 (5th Cir.1984)). *See also Klarman v. Santini*, 503 F.2d 29, 36 (2d Cir.1974)(rejecting argument that a party's failure to specifically request attorneys' fees in pleadings is in itself a bar to recovery), *cert. denied*, 419 U.S. 1110, 95 S.Ct. 785, 42 L.Ed.2d 807 (1975).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

DRILL SOUTH, INC.	]
	]
Plaintiff(s),	]
	]
vs.	CV-96-N-2682-S
	]
INTERNATIONAL FIDELITY INSURANCE COMPANY,	]
	]
Defendant(S).	

Final Judgment

In accord with the memorandum of opinion entered contemporaneously herewith, it is hereby **ORDERED, ADJUDGED** and **DECREED**;

1. Drill South, Inc. shall have and recover of defendant International Fidelity Insurance Company the sum of ONE HUNDRED FIFTY-ONE THOUSAND, SEVEN HUNDRED SIXTY and 30/100 DOLLARS ($151,760.30); interest on such sum at the rate of one and one-half percent per month since July 30, 1996; and

attorney fees of FOURTEEN THOUSAND, THREE HUNDRED FIFTY-THREE and 54/100 DOLLARS ($14,353.54);

2. The parties' cross-motions for partial summary judgment are **DENIED** as moot;

3. Costs of this action are **TAXED** against defendant International Fidelity Insurance Company and in favor of plaintiff Drill South, Inc.

Done, this 5th of September, 1997

EDWIN L. NELSON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

DRILL SOUTH, INC.	]
	]
Plaintiff(s),	]
	]
vs.	CV-96-N-2682-S
	]
INTERNATIONAL FIDELITY INSURANCE COMPANY,	]
	]
	]
Defendant(S).	

Memorandum of Opinion

I. Introduction

In this Miller Act case, the original plaintiff, United States of America, for the use of Miller Drilling Co., Inc. ("Miller Drilling"), brought claims against Drill South, Inc. ("Drill South"), Enviro-Group, Inc. ("Enviro-Group"), and International Fidelity Insurance Company ("International Fidelity'), pursuant to 40 U.S.C. §§ 270a, 270b (the "Miller Act") and Alabama Law. Drill South and International Fidelity each then brought crossclaims against Enviro-Group, and International Fidelity filed a third-party complaint against Robert G. Woodward, Jr. and Gayla S. Woodward. The Clerk of Court entered default judgments against Enviro-Group in favor of both Miller Drilling and Drill South on April 7, 1997. Upon receiving notification that Miller Drilling's claims had been successfully mediated, the court dismissed Miller Drilling's claims and

Drill South's counterclaims on May 27, 1997. The court then ordered on June 9, 1997, that the parties be realigned such that Drill South is now the plaintiff, and International Fidelity is now the defendant.

This matter is presently before the court on the issue of International Fidelity's liability for Enviro-Group's default judgments.[14/] Upon due consideration, the court finds that International Fidelity is liable for the judgments in favor of both Miller Drilling and Drill South.

B. Statement of Facts.

This action arises from a construction project at the Redstone Arsenal in Huntsville, Alabama. Enviro-Group contracted with the United States to perform the construction, while International Fidelity issued payment and performance bonds on behalf of Enviro-Group, as required by the Miller Act. Drill South entered into a subcontract with Enviro-Group pursuant to which Drill South agreed to perform certain well drilling and installation services that Enviro-Group had contracted to

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[14/] At the August 29, 1997, motion docket, both parties were specifically asked by the court whether the issue of the binding nature of default judgment against Enviro-Group was properly before this court for consideration. Both parties agreed that the issue was properly before the court to decide. Additionally, the parties conceded at the motion docket that a ruling that the default judgment is binding on International Fidelity would "subsume" the two pending motions for partial summary judgment and render them moot.

perform for the United States. Miller Drilling, in turn, entered into a subsubcontract with Drill South to perform some of those well drilling and installation services that Drill South had contracted to perform for Enviro-Group.

Enviro-Group defaulted on its contract with the United States; therefore, the United States called the performance bond and demanded that International Fidelity complete the work. International Fidelity has assumed Enviro-Group's obligations.

Enviro-Group also defaulted on the subcontract with Drill South. Drill South completed all work required by the subcontract including additional work required by Enviro-Group, and Miller Drilling completed all work required by the subsubcontract. Enviro-Group, however, refused to pay Drill South, and Drill South refused to pay Miller Drilling.

C. Discussion.

Now that the court has entered default judgments against Enviro-Group in favor of Miller Drilling and Drill South, the issue remains as to International Fidelity's liability as surety for Enviro-Group on the default judgments. Drill South asserts that International Fidelity agreed to be bound by the judgments. First, Drill South argues that the Miller Act imposes on International Fidelity an agreement to be bound by the judgment rendered against Enviro-Group. Second, Drill South contends that International Fidelity expressly agreed to be bound by such a judgment when it issued a bond providing for joint and several liability with Enviro-Group. *Drill South's Issue Memorandum* at 5. Furthermore, Drill South asserts that

International Fidelity is Enviro-Group's privy because the two entities share concurrent interests in the subcontract and, as such, is bound by a judgment against its principal. *Id.* at 6.

International Fidelity, on the other hand, argues that it is not bound by default judgment against Enviro-Group because such a ruling would be "contrary to well-established case law" and would violate its rights to due process. *International Fidelity Response* at 4. International Fidelity contends that if the court were to hold it liable for an amount of damages supported solely by the affidavit of a Drill South representative, it would not have an opportunity to contest the amount of damages allegedly sustained. *Id.*

Drill South asserts in reply that International Fidelity's agreement of indemnification with Enviro-Group appoints International Fidelity as the attorney-in-fact for Enviro-Group and grants International Fidelity the "'right to adjust, settle, or compromise any claim, demand, suit or judgment upon the [payment bond] . . . '" *Drill South's Reply Brief* at 3-4 (quoting the agreement). Drill South argues that, as a result, International Fidelity had a choice with regard to the motion for default judgment – "either oppose the default judgment by proffering a defense on the merits, or waive its opportunity to present a defense." *Id.* at 6. The plaintiff contends that International Fidelity opted for the later although it was given notice and opportunity to do otherwise at the hearing held on the motion for default judgement. *Id.* at 7-8.

The Miller Act requires a contractor on a federal construction project to furnish a payment bond to secure payment to all suppliers of labor and material. 40 U.S.C. §

270(a)(2). A supplier who within ninety days after the last labor was performed or material delivered is not fully paid can bring suit on the bond upon giving notice to the general contractor. § 270(a). The Miller Act is "highly remedial in nature" and is interpreted liberally to effectuate its purpose of protecting subcontractors and suppliers from nonpayment. *J.W. Bateson Co. v. United States ex rel. Bd. of Trustees*, 434 U.S. 586, 594 (1978); *United States v. Wiring, Inc.*, 646 F.2d 1037, 1042 (5th Cir. 1981). The purpose of a Miller Act payment bond is "to protect subcontractors and suppliers who provide labor and material for a federal project, because federally owned lands or buildings are exempt from the liens that would normally secure these parties' rights under state law." *United States ex rel. Pertun Constr. Co. v. Harvesters Group, Inc.*, 918 F.2d 915, 917 (11th Cir. 1990) (citing *United States ex rel. Sherman v. Carter*, 353 U.S. 210, 216 (1957)).

"The Miller Act provides a federal cause of action, and the scope of the remedy as well as the substance of the rights created thereby is a matter of federal . . . law." *F.D. Rich Co., Inc. v. United States ex rel. Indus. Lumber Co., Inc.*, 417 U.S. 116, 127 (1974). Courts uniformly hold that a surety is bound by a judgment against its principal[15/] when

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15/ Moreover, courts routinely hold that a Miller Act surety is bound by a judgment against its principal rendered by a tribunal of competent jurisdiction. *See, e.g., United States v. M.J. Kelley Corp.*, 968 F.2d 658, 661 (6th Cir. 1993) (holding that Miller Act surety is bound by arbitration award against the principal); *United States ex rel. Aurora Painting, Inc. v. Fireman's Fund Ins. Co.*, 832

it had full knowledge of the action and an opportunity to defend. *See Lake County ex rel. Baxley v. Massachusetts Bonding & Ins. Co.*, 75 F.2d 6, 8 (5th Cir. 1935); *Seaboard Surety Co. v. Westwood Lake, Inc.*, 277 F.2d 397 (5th Cir. 1960); *cf. Frederick v. United States*, 386 F.2d 481, 485 & n.6 (5th Cir. 1967) (holding that a judgment against a principal conclusively establishes the liability of a surety, as long as the surety had notice of the proceedings against the principal). The District Court for the Eastern District of New York explained the rationale behind such a rule:

> A surety cannot stand idly by with full knowledge of an action pending against its principal, permit a judgment to be taken against the principal, and later on, when an action is brought upon its bond, require the plaintiff to retry his case. This would result in two trials of the same issue. It would retard and not promote the administration of justice.

United States ex rel. Vigilanti v. Pfieffer-Neumeyer Constr. Corp., 25 F. Supp. 403, 404 (E.D.N.Y. 1938). However, the *Pfieffer-Neumeyer* court held that the above-cited rule is inapplicable where a judgment of default is entered against the principal in an action in which the surety is also a party. *Id.* at 405. That court so held because, according to the facts of the case, the surety did not forgo its opportunity to defend *itself* against claims by the subcontractor; rather, it filed an answer denying the plaintiffs claims and its liability on such claims. *Id.* The *Pfieffer-Neumeyer* court reasoned

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F.2d 1150, 1151 (9th Cir. 1997) (holding that a surety on a Miller Act subcontract was bound by an arbitration decision ratified by a state court).

that "[t]his is not a case in which the sureties had the opportunity to defend, and failed to defend, an action which was brought against their principal." *Id.* The court apparently determined that because the surety was a defendant in the same action as its principal and, therefore, had its own "separate" interests as a named defendant, it had no reason (or, in the courts words, an "opportunity") to make a defense on behalf of its principal prior to the court's entering a default judgment against the principal. *See Id.* On this basis, the *Pfieffer-Neumeyer* court ruled that the default judgment against the principal could not be used as evidence of the surety's liability to the subcontractor on the bond. *Id.*

International Fidelity concedes that cases in which sureties have been bound by a judgment against a principal generally involve sureties that had knowledge of the proceeding against the principal and an opportunity to defend the action, but failed to do so. *See International Fidelity's Response to Issue Memorandum* at 3. International Fidelity argues, however, that in none of these reported cases was a *default* judgment entered against the principal in an action in which the principal and surety were sued together, and that this is a "critical distinction" that should be drawn by the court. *See id.* at 4-5.

The *Pfieffer-Neumeyer* decision appears to be the only one of its kind; the court can find no other reported case law on point. This court, however, finds the policy rationale contained in *Pfieffer-Neumeyer*, and relied upon by International Fidelity, devoid of any basis in law or reason. It would be an anomaly to conclude that a surety can be held liable under the general rule for standing idly by while its principal suffers an adverse judgment when the

judgment is rendered in an action where the surety is not a party, and in the same breath conclude that the surety *can* stand idly by, without liability, and allow a default judgment to be rendered against its principal merely because the surety was a co-defendant to the action. In the former case, the surety is afforded much less opportunity to defend its interest than in the latter, where it is already a party, has full knowledge of the proceedings, and can be freely oppose the judgment against its principal.

In its submission to the court and at the motion docket on August 29, 1997, Drill South argued that the Second Circuit decision of *Hutton Construction Co. v. County of Rockland*, 52 F.3d 1191, 1192 (2nd Cir. 1995), demonstrates that International Fidelity had an affirmative duty to defend Enviro-Group's default judgment. Interestingly, *Hutton* involved International Fidelity, the surety in this action, and involved the exact same form contract of indemnity. *See Hutton Constr. Co. v. County of Rockland*, Nos. 93-CIV-2465 (LAP) & 87-CIV-4027 (LAP), 1993 WL 535012, at *1-*2 (S.D. N.Y. Dec. 22, 1993). *Hutton* Merely stands for the proposition, however, that the surety had the *right*, under the contract, to exercise all rights assigned to it under the contract, which included *Hutton*, as here, the right "to adjust, settle, or compromise any claim . . . upon the Bonds." *Hutton*, 52 F.3d at 1192; Agreement of Indemnity at ¶13 ("Settlement"). When the surety in *Hutton* settled the bond claims against its principal, and the principal subsequently refused to stipulate to the case's dismissal, the court held that International Fidelity had the superior right to protect its interests under the agreement of indemnity, despite the principal's protestations to the contrary. *See Hutton, 52 F.3d at 1192.*

If the surety in *Hutton*–which was, coincidentally, International Fidelity–had the right and opportunity to protect its interests and did so, it seems highly illogical why this court should agree with such sound reasoning and at the same time hold that International Fidelity can stand idly by and refuse to protect its interests (here, a judgment setting the amount of recovery Drill South may obtain against International Fidelity's principal, Enviro-Group), when International Fidelity had full notice of the potential for the default judgment and possessed numerous opportunities[16/] to defend the ultimate judgment. Against this background, the general rule is applicable in the instant case; namely, that a surety who is a party to the action is bound by a judgment, default or otherwise, against its principal, as long as the surety had notice and an opportunity to defend. *Lake County*, 75 F.2d at 8.

Here, International Fidelity had both adequate notice and an opportunity to defend against the default judgment of its principal, Enviro-Group. When Drill South filed its motion for default judgment against Enviro-Group, International Fidelity was faced with a choice: either oppose the default judgment by proffering a defense on the merits, or waive its opportunity to present a defense. In fact, on March 11, 1997, the court ordered that "any party wishing to be heard on the motion [for default judgment against Enviro-Group] shall file its submission prior to the close of business on March 26, 1997." On March 21, 1997, pursuant to the courts order International Fidelity filed its response indicating its choice to not proffer a defense after

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16/ *See infra* not 7 (discussing International Fidelity's "opportunities to defend").

apparently concluding that a judgment against Enviro-Group would not be binding on it. In its filed response, International Fidelity relied upon *United States v. Maryland Cas. Co.*, 204 F.2d 912, 915 (5th Cir. 1953), and argued that

> [u]nder Alabama law, as applied by the United States Court of Appeals for the former Fifth Circuit, a judgment against a principal is without effect on tis surety unless so provided by the contract of suretyship. . . . Accordingly, a default judgment in favor of [sic] Enviro-Group, Inc., as principal, is not binding on International Fidelity as surety.

See International Fidelity's Response to Plaintiffs Motion for Default Judgment at ¶2 (citing United States v. Maryland Cas. Co., 204 F.2d 912, 915 (5th Cir. 1953)).

However, International Fidelity omitted from its submission to the court that *Maryland Cas. Co.* also recognized that Alabama law holds that a surety *is* bound by a judgment against its principal if the surety is "either a party or a privy." *See Maryland Cas. Co.*, 204 F.2d at 915 (quoting *Fireman's Ins. Co. v. McMillan*, 29 Ala. 147 (1856)). Here, International Fidelity is both.

A party is one who is both names as a party to the action and subjected to the court's jurisdiction. Restatement (Second) of Judgments § 34 (1980). Persons become subject to a court's jurisdiction in one of several ways. One may voluntarily subject oneself to the court's jurisdiction "by making an appearance or participating in the action in a manner that has the effect of an appearance.

In the absence of such a submission to the jurisdiction of the court, to become a party a person must be served with process or its equivalent..." *Id.* at comment a. "As to defendants, the fundamental requirements are designation as a party , compliance with valid procedures designed to give notice of the action, and a basis of jurisdiction. Most statements of this principle are negative: a person is not bound absent compliance with these requirements." 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4449 at 411-12 (1981). It is undisputed that International Fidelity is a party in this action. As such, International Fidelity is bound by the default judgment against its principal, Enviro-Group.

Though not necessary to the result reached here, the court also concludes that International Fidelity is a privy of Enviro-Group. Entities are in privy where their relationship is sufficiently close that a judgment against one should bind the other. *See Hart v. Yamaha-Parts Distributors, Inc.*, 787 F.2d 1468, 1473 (11th Cir. 1986) (citing *Southwest Airlines Co. v. Texas Int'l Airlines Co.*, 546 F.2d 84, 95 (5th Cir. 1977)); *see also* Allan D. Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 Iowa L. Rev. 27 (1964) (explaining that the term "privity" in itself does not state a reason for either including or excluding an entity from the binding effect of a prior judgment, but rather it represents a legal conclusion that the relationship between one entity and another entity is sufficiently close to afford application of the principle of preclusion). Here, pursuant to the Agreement of Indemnity, International Fidelity was Enviro-

Group's attorney-in-fact[17/] with respect to claims against bonds, which provided International Fidelity with the right to resolve all actions against IF or Enviro-Group.[18/] *See* Agreement of Indemnity at ¶13 & ¶18.

17/ The Agreement of Indemnity appoints International Fidelity as the attorney-in-fact for Enviro-Group as follows:

> [Enviro-Group] hereby irrevocably nominate[s], consitute[s], appoint[s] and designate[s] {International Fidelity] as their attorney-in-fact with the right, but not the obligation, . . in the name of [Enviro-Group] to make, execute, and deliver any and all additional or other assignments, documents, or papers deemed necessary and proper by [International Fidelity] in order to give . . . the full protection intended to be herein given to the surety under all other provisions of this agreement. [Enviro-Group] hereby notify[ies], and confirm[s] all acts and actions taken and done by [IF] as such attorney-in-fact.

Agreement of Indemnity at ¶18 ("Attorney in Fact")

18/ The Agreement of Indemnity provides the following

> [IF] shall have the right to adjust, settle, or compromise any claim, demand, suit or judgment upon the [payment bond]. . . .
>
> Agreement of Indemnity at ¶13 ("Settlement").

As Drill South argued to the court, International Fidelity had the right and therefore, the opportunity to appear on behalf of Enviro-Group to defend against the default judgment.[19] *See Drill South's Reply Brief*

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[19] Moreover, even after International Fidelity had this opportunity to defend judgment on behalf of its principal, Enviro-Group, the court entered an Order on March 28, 1997, setting a hearing for April 7, 1997, to hear argument on "the issues of the entry of default judgment against Enviro-Group, any damages arising therefrom, and whether such a default judgment is binding on International Fidelity as a surety." International Fidelity was present at the April 7, 1997, hearing, yet denied liability on any default judgment that may be rendered against Enviro-Group and failed to step in and defend Enviro-Group on the merits. At this hearing, the court accepted a memorandum from Drill South on the effect of a default judgment as to the liability of International Fidelity. The court entered an Order on April 7, 1997, entering a default judgment against Enviro-Group and directing International Fidelity to respond to Drill South's memorandum, giving International Fidelity yet another opportunity to be heard on the issue. On April 22, 1997, International Fidelity submitted to the court a responsive memorandum and, relying upon the *Pfieffer-Neumeyer* case discussed *supra*, argued that the present case "is not a case in which the surety had an opportunity to defend." *International Fidelity's Response to Issue Memorandum* at 6. The court also entertained argument from the parties on this issue on August 29, 1997, at a motion docket. At the motion docket, International Fidelity argued in vague terms only that, at the April 7, 1997, hearing on August 29, 1997, where the parties argued this

Concerning the Preclusive Effect on International Fidelity of a Default Judgment Against Enviro-Group at 4. The Agreement of Indemnification provides International Fidelity with the authority to take all steps it deems "necessary and proper . . . to give . . . full protection . . . to [International Fidelity]." *See* Agreement of Indemnity at ¶18 ("Attorney in Fact"). As a Miller Act surety, International Fidelity will no doubt be liable to subcontractors such as Drill South on the surety bond because Enviro-Group, the principal, failed to make payments to Drill South on the Enviro-Group-Drill South subcontract. The parties dispute, however, the measure of such liability. Despite the fact that a default judgment against Enviro-Group and in favor of Drill South would arguable "set" the amount that Drill South could recover from Enviro-Group) and, in turn, from International Fidelity up to the limits of the indemnity agreement), International Fidelity chose not to defend Enviro-Group, not to oppose Drill South's motion for a default judgment, and not to offer any evidence on the amount of Enviro-Group's liability to Drill South. Therefore, unlike the surety in *Pfeiffer-Neumeyer*, International Fidelity "had the opportunity to defend, and failed to defend, an action which was brought against [its] principal." *Pfeiffer-Neumeyer Constr. Corp.*, 25 F. Supp. At 404. As a result, and in light of the Miller Act's strong policy in favor of protecting subcontractors and suppliers from nonpayment, this court

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issue to the court, International Fidelity was provided with more than ample opportunity tp defend the default judgment against its principal, Enviro-Group, and to defend its potential liability as to the binding nature of the default judgment.

finds that International Fidelity is liable on the default judgment entered against Enviro-Group.

D. Conclusion

Accordingly, the court finds that International Fidelity is liable on the April 7, 1997, default Judgments entered against Enviro-Group. This holding renders moot the parties' cross-motions for partial summary judgment and they will, for that reason, be denied. By separate order, the court will enter judgment in favor of Drill South and against International Fidelity in the amount of $151,760.30 principal; interest at the rate of one and one-half percent per month since July 30, 1996; and attorney fees of $14,353.54. Entry of this final judgment will conclude this litigation.
Done, this 5th of September, 1997

EDWIN L. NELSON
UNITED STATES DISTRICT JUDGE

40 U.S.C. § 270a

Bonds of contractors for public buildings or works

(a) Type of bonds required

Before any contract for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. The amount of the payment bond shall be equal to the total amount payable by the terms of the contract unless the contracting officer awarding the contract makes a written determination supported by specific findings that a payment bond in that amount is impractical, in which case the amount of the payment bond shall be set by the contracting officer. In no case shall the amount of the payment bond be less than the amount of the performance bond

(b) Waiver of bonds for contracts performed in foreign countries

The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such

contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Authority to require additional bonds

Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

(d) Coverage for taxes in performance bond

Every performance bond required under this section shall specifically provide coverage for taxes imposed by the United States which are collected, deducted, or withheld from wages paid by the contractor in carrying out the contract with respect to which such bond is furnished. However, the United States shall give the surety or sureties on such bond written notice, with respect to any such unpaid taxes attributable to any period, within ninety days after the date when such contractor files a return for such period, except that no such notice shall be given more than one hundred and eighty days from the date when a return for the period was required to be filed under Title 26. No suit on such bond for such taxes shall be commenced by the United States unless notice is given as provided in the preceding sentence, and no such suit shall be commenced after the expiration of one year after the day on which such notice is given.

40 U.S.C. § 270b

Rights of persons furnishing labor or material

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under sections 270a to 270d of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by any means which provides written, third-party verification of delivery to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

(c) Any waiver of the right to sue on the payment bond required by sections 270a to 270d of this title shall be void unless it is in writing, signed by the person whose right is waived, and executed after such person has first furnished labor or material for use in the performance of the contract.

Supreme Court, U.S.
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No. 00-1402

In The

Supreme Court of the United States

INTERNATIONAL FIDELITY INSURANCE CO., INC.,

Petitioner,

v.

DRILL SOUTH, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT DRILL SOUTH, INC.'S BRIEF IN OPPOSITION

PETER M. CROFTON
Counsel of Record
191 Peachtree Street
Atlanta, Georgia 30303
(404) 572-4600

ROBERT O. FLEMING, JR.
SMITH, CURRIE & HANCOCK
233 Peachtree Street, Suite 2600
Atlanta, Georgia 30303
(404) 521-3800

Counsel for Respondent Drill South, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a Miller Act surety who is a party to a lawsuit against its principal, is a privy of that principal, and has notice and the opportunity to defend that principal, is bound by a default judgment against the principal?

PARTIES TO THE PROCEEDING

Petitioner is International Fidelity Insurance Company. Respondent is Drill South, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Drill South, Inc. states that it is a privately owned company, has no parent company, and no publicly held company owns 10% or more of its stock.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Drill South, Inc. ("Drill South") respectfully submits that the decision below correctly analyzed the facts and applied governing law, and that the Petition for Writ of Certiorari, presenting no valid grounds for review, should be denied.

STATEMENT OF THE CASE

The controlling facts are set forth in detail in the opinions of the District Court and the Court of Appeals. App. 1a – 33a. Because the Petition omits several determinative facts, Drill South provides the following supplemental statement as required by Supreme Court Rule 15.2.

Enviro-Group entered into an Agreement of Indemnity with International Fidelity Insurance Company ("IFIC"). That Agreement afforded IFIC extensive rights in the event a claim was asserted against the Miller Act bond at issue here, including the "right to adjust, settle, or compromise any claim, demand, suit or judgment upon the [payment bond]." App. 6a. The Agreement designated IFIC as Enviro-Group's "attorney-in-fact," and gave IFIC the legal right to step in and defend Enviro-Group against the default judgment. *Id.*

IFIC had numerous opportunities to exercise its rights under the Agreement of Indemnity, and to proffer a defense on behalf of Enviro-Group, including: (1) the opportunity to file a response to Drill South's motion for default judgment; (2) the opportunity to appear and be

heard in April 1997 on "the issues of entry of the default judgment against Enviro-Group, any damages arising therefrom, and whether such default judgment is binding on [IFIC] as a surety;" (3) the opportunity to file a post-hearing brief on the issues raised at the April hearing; and (4) the opportunity to argue before the District Court at a motion docket prior to entry of judgment against it. App. 5a – 6a n.3.

ARGUMENT

I. IFIC HAD NOTICE AND THE OPPORTUNITY TO DEFEND, AND THEREFORE RECEIVED DUE PROCESS.

This Court previously explained what "due process" requires where a party seeks to bind another by a judgment:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950) (citations omitted).

IFIC received due process because it had notice and the opportunity to defend against the default judgment against its principal. The Eleventh Circuit rejected IFIC's due process claim because it found the "record is replete with instances in which the district court afforded [IFIC] both notice and opportunity to step in and defend the merits of Drill South's claims against Enviro-Group and the extent of its liability." App. 5a.

II. THE ELEVENTH CIRCUIT PROPERLY APPLIED PRIOR DECISIONAL LAW

A. Federal Law

1. IFIC is Bound Under the "Notice and Opportunity to Defend" Standard Established by Federal Law

The Eleventh Circuit applied federal decisional law in holding that a Miller Act surety with notice and the opportunity to defend its principal is bound by a default judgment against that principal. The Eleventh Circuit recognized that individual states have different rules concerning the effect on a surety of a default judgment against its principal,[3] but relied upon prior binding Fifth Circuit precedent for its decision. App. 4a – 5a, 8a – 9a.

Federal decisional law provides that a surety is bound by a default judgment against its principal if it had

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[3] The decisional law concerning the effect on a surety of a default judgment against its principal is surveyed in *Ohio Casualty Ins. Co. v. Kentucky Natural Resources & Envtl. Protection Cabinet*, 711 S.W.2d 860 (Ky. App. 1986).

notice and the opportunity to defend against that judgment:

> Where it appears that the judgment against the [principal] was obtained in a suit of which the surety had full knowledge, and which it had full opportunity to defend, the judgment therein is not only evidence, but conclusive evidence, against every defense except that of fraud and collusion in obtaining it.

Lake County ex rel. Baxley v. Massachusetts Bonding & Ins. Co., 75 F.2d 6, 8 (5th Cir. 1935) (state payment bond). *See also Frederick v. United States*, 386 F.2d 481, 485 n.6 (5th Cir. 1967) ("A judgment against a principal conclusively establishes against a surety the fact of, and amount of, the principal's liability, except against defenses of fraud or collusion, if obtained in a suit of which surety had full knowledge and opportunity to defend."); *United States ex rel. Vigilanti v. Pfeiffer-Neumeyer Constr. Corp.*, 25 F.Supp. 403, 404 (E.D.N.Y. 1938) ("Where the judgment sought to be offered in evidence was procured in an action of which the surety had full knowledge, and which it had full opportunity to defend but failed to do so, the judgment in that action is conclusive evidence against the [surety], except the defense of collusion and fraud in obtaining it.").

Here, IFIC had both notice and the opportunity to defend its principal against the default judgment. As explained by the Eleventh Circuit and the District Court, IFIC's Agreement of Indemnity afforded IFIC the right to present a defense on behalf of Enviro-Group, but IFIC chose not to avail itself of that right. App. 5a – 8a, 26a – 33a. Consequently, the Eleventh Circuit and the District Court

correctly concluded that IFIC is bound by the default judgment.

2. The Decision Below Does Not Conflict With Prior Federal Decisions

IFIC contends that the Eleventh Circuit misinterpreted federal law, and thereby created a conflict with prior binding decisions of that Court. Specifically, IFIC contends that the "notice and opportunity to defend" standard conflicts with a general rule that default judgments are not entitled to preclusive effect. (pp. 12-14, Petition). But the alleged conflict is illusory, because the "notice and opportunity to defend" standard is the functional equivalent of "a fair opportunity procedurally, substantively and evidentially to contest the issue" – the standard applied in determining whether collateral estoppel arises from a default judgment. *See In re Bush*, 62 F.3d 1319, 1323 (11th Cir. 1995) (citations omitted).

IFIC's assertion of a conflict with decisions of the Ninth Circuit is also without merit. (pp. 11-12, Petition). The "notice and opportunity to defend" standard is entirely consistent with Ninth Circuit decisional law. For example, in *United States ex rel. Aurora Painting, Inc. v. Fireman's Fund Ins. Co.*, 832 F.2d 1150 (9th Cir. 1987), the Ninth Circuit affirmed a decision which held a Miller Act surety preclusively bound by a state court judgment confirming an arbitration award against its principal. The Court rejected the surety's argument that it was not bound by the arbitration award because it was not a party to the arbitration or confirmation proceedings:

> Normally, a judgment against a principal conclusively establishes against a surety the fact of and the amount of the principal's liability as long as the surety has notice of the proceeding against the principal.

Id. at 1153 (citing *Frederick v. United States*, 386 F.2d 481, 485 n.6 (5th Cir. 1967)). Once again, that is the functional equivalent of the "notice and opportunity to defend" standard applied by the Eleventh Circuit.

The Eleventh Circuit properly applied prior federal precedent to hold IFIC bound by the judgment against its principal where it had notice and the opportunity to defend its principal against that judgment.

B. Alabama Law

1. IFIC is Bound Under the "Party or Privy" Standard Established by Alabama Law

Although the Eleventh Circuit applied federal law in deciding this Miller Act case, it explained that IFIC would be equally bound by the default judgment against its principal under Alabama substantive law. App. 7a n.5. Under Alabama law, a surety is preclusively bound by a default judgment rendered against its principal if the surety is a privy of the principal or is a party to the action in which the judgment is rendered. *Firemen's Ins. Co. v. McMillan*, 29 Ala. 147, 167-68 (1856). Because IFIC is Enviro-Group's privy and was a party to the action in which the default judgment was rendered, IFIC is preclusively bound by the default judgment under Alabama law. App. 7a n.5.

On appeal, IFIC did not contest the District Court's finding that IFIC is Enviro-Group's privy, App. 29a, and is therefore barred from raising that issue now. *E.E.O.C. v. Fed'l Labor Relations Auth.*, 476 U.S. 19, 24 (1986). Consequently, even if the Eleventh Circuit erred in applying federal law, that error is harmless because IFIC is bound by the judgment against its principal under Alabama law.

2. The Decision Below Does Not Conflict With Prior Alabama Law Decisions

Once again, IFIC asserts the existence of conflict with prior decisions (pp. 7-11, Petition) where no such conflict exists.

First, IFIC contends that the sureties in *United States v. Maryland Casualty Co.*, 204 F.2d 912 (5th Cir. 1953), were not bound by the default judgment because the bonds "were not undertakings to be bound by a judgment." (p. 8, Petition). However, the Fifth Circuit explained that the sureties in that case were not bound because the bonds at issue were not judgment bonds *and* because the sureties were neither the privies of the principals nor parties to the action in which the default judgment was rendered – recognizing that Alabama law holds a surety bound by a judgment against its principal if the surety is "either a party or a privy." *Maryland Casualty*, 204 F.2d at 915.[2]

Second, IFIC misrepresents the holding in *Firemen's Ins. Co. v. McMillan*, 29 Ala. 147 (1856), by selectively

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[2] IFIC omits the crucial "party or privy" aspect of the *Maryland Casualty* decision from its Petition, just as it did in its submission to the District Court. *See* App. 28a.

quoting from the opinion. According to IFIC, "*Fireman's [sic] Ins.* states that 'the true rule is that a recovery against a principal cannot be used as evidence to charge a surety.' " (p. 9, Petition). That "rule" applies only where the surety is neither a party to the lawsuit nor a privy of its principal, as is evident when the language quoted by IFIC is read in context:

> The true rule is, that a recovery against the principal cannot be used as evidence to charge the surety, except in cases where the contract of the surety can be construed into an undertaking to be bound by the result of legal proceedings against the principal; and we apprehend, when the judgment is binding on the surety at all, it is conclusive and not merely *prima-facie* evidence. There is, in our opinion, no middle ground. *The surety is either a party, or privy, and bound by the judgment; or a stranger, and not bound.*

29 Ala. at 147 (emphasis added and citations omitted).

Here, IFIC was both party and privy, App. 28a – 29a, and bound by the judgment against its principal.

III. IFIC CONFUSES THE RIGHT TO DEFEND WITH THE OBLIGATION TO DEFEND

As the Eleventh Circuit explained, IFIC had the legal right to defend Enviro-Group against the default judgment. App. 5a – 8a. IFIC misreads the Eleventh Circuit's opinion as "impos[ing] an obligation upon the surety to defend its principal inconsistent with standard commercial practices in suretyship." (p. 17, Petition).

IFIC continues to erroneously equate a "right" with an "obligation," despite the Eleventh Circuit's careful explanation of the difference:

> To the extent that [IFIC] argues that it had no obligation to defend the action against Enviro-Group, we are not persuaded. We believe the issue is not whether the Agreement of Indemnity imposed an obligation on [IFIC] to defend Enviro-Group, but whether it conferred a right to defend. The law requires only that a surety have notice and an opportunity to defend before it is bound by a judgment against its principal. We believe [IFIC] had this right and opportunity, and simply chose, for whatever reason, not to exercise its right.

App. 7a – 8a (footnote omitted).

The Eleventh Circuit has not imposed an obligation on a surety to defend its principal, but rather has made clear that when a surety has the contractual right to defend but elects not to do so, it proceeds at its own peril.

CONCLUSION

The Petition fails to demonstrate any valid ground for review of the decision below, and should be denied.

Respectfully submitted,

PETER M. CROFTON
Counsel of Record
191 Peachtree Street
Atlanta, Georgia 30303
(404) 572-4600

ROBERT O. FLEMING, JR.
SMITH, CURRIE & HANCOCK
233 Peachtree Street, Suite 2600
Atlanta, Georgia 30303
(404) 521-3800

Counsel for Respondent
Drill South, Inc.

(3)

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No. 00-1402

In The
SUPREME COURT OF THE UNITED STATES

INTERNATIONAL FIDELITY INSURANCE CO., INC.,
Petitioner,

v.

DRILL SOUTH, INC.,
Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Eleventh Circuit

PETITIONER INTERNATIONAL FIDELITY INSURANCE CO.'S REPLY BRIEF

NEIL L. HENRICHSEN
Counsel of Record
HENRICHSEN SIEGEL, P.L.L.C.
1850 M Street, N.W. Suite 250
Washington, D.C. 20036
(202) 293-7766
Attorney for Petitioner
International Fidelity Insurance Co.

April 16, 2001

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QUESTIONS PRESENTED

1. Whether binding a Miller Act surety to a default judgment entered against the surety's principal in the same lawsuit and precluding the surety's assertion of defenses violates the surety's right to due process under the Fifth Amendment of the Constitution.

2. Whether the Eleventh Circuit's decision binding a surety to a default judgment entered against its principal in the same lawsuit creates a conflict within the Eleventh Circuit and with decisions in other Circuits.

PARTIES TO THE PROCEEDING

Petitioner is International Fidelity Insurance Company. Drill South, Inc. is the Respondent.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner International Fidelity Insurance Company states that it is a privately owned company, has no parent company and no publically held company owns 10% or more of its stock

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PETITIONER INTERNATIONAL FIDELITY INSURANCE CO.'S REPLY BRIEF

International Fidelity Insurance Company, Inc. ("International Fidelity") respectfully files this Reply in support of its petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

ARGUMENT

I. **The Eleventh Circuit's Decision To Bind International Fidelity By The Default Judgment Entered Against Its Principal Is In Conflict With Decisions Of The Ninth Circuit.**

Drill South alleges that there is no inconsistency in the case law on the question of whether a surety is bound by a default entered against its principal because International Fidelity had notice and the opportunity to defend its bond principal, and International Fidelity was a "party or privy" to the underlying case. Focusing on the "party or privy" element, however, ignores the fact that cases from the Eleventh and Ninth Circuits holding that a surety is bound by a default against its principal involve a judgment bond. That is not the case here. There is no judgment bond at issue in this case.

Drill South also contends that International Fidelity misrepresents the holdings in United States v. Maryland Casualty Co., 204 F.2d 912 (5th Cir. 1953) and Fireman's Insurance Co. v. McMillan, 29 Ala. 147 (1856), by failing to mention the "party or privy" standard. Respondent's Opposition at 7-8. Drill South's allegation is without merit.

There is no dispute that International Fidelity was an active participant in the underlying litigation defending the claim of Drill South on the merits. In the cases cited by the Respondent, the respective courts concluded that, because (1) the surety was a party or privy and (2) the underlying bonds at issue were undertakings to be bound (e.g., judgment bonds), the surety would be bound by any

judgment entered by default or otherwise against the bond principal. Maryland Casualty, 204 F.2d at 915; McMillan, 29 Ala. 147.

In this case, the underlying bond was not an undertaking to be bound by a judgment. The holdings in Maryland Casualty and McMillan emphasizing that a prior judgment is binding on the surety only where the underlying obligation is an undertaking to be bound, are, therefore, not inconsistent with the surety's position in this case.

Furthermore, Drill South's assertion that there is no conflict between the Eleventh Circuit's ruling and decisions from the Ninth Circuit is erroneous. In United States v. Hayes, 369 F.2d 671 (9th Cir. 1966) and Axess International, Ltd. v. Intercargo Insurance Co., 183 F.3d 935 (9th Cir. 1999), the Ninth Circuit held that a surety is not bound by a default judgment rendered against its principal unless the surety's obligation is created by an undertaking to be bound. Id. at 940. These cases are similar to Maryland Casualty and McMillan. The Eleventh Circuit's decision in this case is, however, inapposite.

The "party or privy" standard must be analyzed in conjunction with, and not independent of, the nature of the underlying obligation. Otherwise, the critical fact that judgment bonds were at issue in each of the cases in which the surety was bound by a default entered against its principal would be rendered meaningless. Analyzing the "party or privy" standard independent of any consideration of the nature of the underlying bonds, as argued by Drill South, would result in the conclusion that a surety must be

bound by a default merely if the surety is a "party or privy," regardless of the nature of the underlying obligation. No case cited by Drill South supports this position. In this case, therefore, the "party or privy" standard is irrelevant because the surety's bond is not a judgment bond.

The bond at issue in this case is a Miller Act payment bond, not an undertaking to be bound by a judgment. Although International Fidelity was actively litigating the merits of Drill South's claim, the Eleventh Circuit's decision to bind it by the default judgment entered against Enviro-Group was error and is in conflict with decisions of the Ninth Circuit.

II. International Fidelity Was Denied Due Process When It Was Bound By The Default Judgment Entered Against Enviro-Group And Denied The Right To Present Its Defenses.

Conspicuously absent from Drill South's Opposition is any mention of the fact that when the district court entered judgment against the surety, International Fidelity was defending the merits of Drill South's claim in the litigation. International Fidelity was also litigating its counterclaim against Drill South. Thus, the issue is not, as Drill South asserts, whether International Fidelity had notice of the suit against Enviro-Group and the opportunity to defend. Respondent's Opposition at 3-6. Rather, the issue is whether International Fidelity, as a co-defendant and as assignee and subrogee of Enviro-Group's claims, was denied due process when the district court stripped it of its right to present claims and defenses in its own name and as assignee and subrogee of Enviro-Group.

Drill South's argument that International Fidelity is a victim of an alleged failure to timely oppose the entry of default against Enviro-Group is misleading and incorrect. Respondent's Opposition at 3. As the record in this case demonstrates, the default against Enviro-Group was entered (1) with the understanding that the default would not be binding on International Fidelity, and (2) after the district court acknowledged that the hearing during which the default was entered was not to be a substitute for a trial on the merits. Against the background of these facts, Drill South can not claim that International Fidelity prejudiced itself by sitting on alleged rights.

Further, there is no merit to Drill South's argument that the "notice and opportunity to defend"standard is equivalent to International Fidelity having "a fair opportunity procedurally, substantively and evidentially to contest the issue." Respondent's Opposition at 5. There is no dispute that International Fidelity had notice and the opportunity to defend itself since it was defending the merits of the claim. The issue in this case, however, is whether the district court's dismissal of International Fidelity's claims and defenses without affording it an opportunity to be heard on the merits denied International Fidelity due process. See, e.g. Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 209, 78 S. Ct. 1087, 1094, 2 L.Ed. 2d 1255 (1958).

Finally, this Court has held that when one of several defendants who is alleged to be jointly liable defaults, judgment should not be entered against him until the matter has been adjudicated against all of the defendants. Frow v.

De La Vega, 82 U.S. 552, 554, 21 L.Ed. 60, 15 Wall. 552 (1872). As noted in Frow,

> [t]he defaulting defendant has merely lost his standing in Court. He will not be entitled to service of notices in the cause, nor to appear in it in any way. He can adduce no evidence, he cannot be heard at the final hearing. But if the suit should be denied against the complainant on the merits, the bill would be dismissed as to all the defendants alike the defaulter as well as the others. If it be decided in the complainant's favor, he will then be entitled to a final decree against all. But a final decree on the merits against the defaulting defendant alone, pending the continuance of the case, would be incongruous and illegal.

82 U.S. at 554.

The Eleventh Circuit's decision binding International Fidelity to the default judgment entered against its principal is contrary to this Court's decision in Frow. After binding International Fidelity to the default, any opportunity to address the merits of the underlying case was lost. Frow assumes that, following the entry of default against one party, the underlying suit would be resolved on the merits. Id. According to Frow, however, should the underlying suit be dismissed, it would be dismissed against all defendants, including the defaulter. Id. The Eleventh Circuit's decision in this case renders the Frow analysis meaningless because a surety bound by a default entered against its principal would never have the opportunity to litigate the merits of the underlying action.

III. Drill South Distorts The Agreement of Indemnity, Which Contemplates That The Surety May Assert Affirmative Claims of its Principal, Not Defend The Bond Principal.

Drill South argues that International Fidelity confuses its right to defend under the Agreement of Indemnity with the obligation to defend. Respondent's Opposition at 8-9. Drill South's argument distorts the Agreement of Indemnity, which provides that the Surety may assert the affirmative claims of its principal and does not require or obligate the surety to defend its bond principal.

The Agreement of Indemnity assigns the bond principal's right to contract funds and claims related to those funds to the surety. The assignment must be read in conjunction with the Agreement of Indemnity's "Attorney-in-Fact" provision, which provides, in relevant part:

> The Contractor and Indemnitors hereby irrevocably nominate, constitute, appoint and designate the surety as their attorney-in-fact with the right, but not the obligation, to exercise all of the rights of the Contractor and Indemnitors assigned, transferred and set over to the Surety in this Agreement . . .

In this case, the assignment and other provisions of the Agreement of Indemnity afforded International Fidelity the right to assert its principal's claims. These provisions do not create the right or obligate the surety to defend its bonded principal. Rather, they are meant to assist the surety in vesting its rights in, among other things, bonded

contract funds and claims that may arise out of the underlying construction contract. See Hutton Construction Company, Inc. v. County of Rockland, 52 F.3d 1191 (2nd Cir. 1995). By upholding the district court's decision to bind the surety to the default entered against the bond principal, the Eleventh Circuit created an obligation that a surety must either defend its principal or suffer the consequences of being bound by the default. There is no right or obligation of the surety to defend its bond principal in the Agreement of Indemnity. Also, the Eleventh Circuit's decision places judicial conditions and constraints on the surety's contract right to assert claims.

The "Settlements" clause of the Agreement of Indemnity also provides that:

> The Surety shall have the right to adjust, settle or compromise any claim, demand, suit or judgment upon the Bonds, unless the Contractor and the Indemnitors shall request the Surety to litigate such claim or demand, or to defend such suit, or to appeal from such judgment, and shall deposit with the Surety, at the time of such request, cash or collateral satisfactory to the Surety in kind and amount, to be used in paying any judgment or judgments rendered or that may be rendered, with interest, costs, expenses and attorney's fees, including those of the Surety.

The express language of the Agreement does not provide that the surety has a "right" to directly defend its principal. Instead, the surety may take steps to protect itself, by, for example, settling and adjusting claims.

The Eleventh Circuit suggests that International Fidelity needed to directly assume the defense of Enviro-Group. This would upset customary practices in the surety industry since sureties do not, as a practice, directly assume the defense of their bond principals. Additionally, in this case, International Fidelity could not have entered an appearance on behalf of Enviro-Group because the surety had a cross-claim for indemnity pending against Enviro-Group. The Eleventh Circuit's holding would require International Fidelity to represent and assert claims on behalf of both parties in the underlying action. This is untenable. The conflict that the Eleventh Circuit's position would create justifies International Fidelity's position, as supported in other courts, that International Fidelity was not required to enter an appearance on behalf of its principal. United States ex rel. Vigilanti v. Pfeiffer-Neumeyer Const. Corp., 25 F. Supp. 403, 405 (E.D.N.Y.).

CONCLUSION

For the reasons stated herein and for the reasons stated in its petition for certiorari, International Fidelity submits that this case presents a question of federal law that is of substantial importance - whether a Miller Act surety is denied due process when it is precluded from defending its interests by operation of a default judgment entered against its bonded principal in the same lawsuit in which the surety is actively defending. The writ should therefore be granted to allow this Honorable Court to reconcile the conflict that exists between the decision of the Eleventh Circuit in this case and those of the Ninth Circuit in Hayes and Access International. Finally, the writ should also be granted to clarify for the Circuits the rights and obligations of a surety.

Accordingly, Petitioner International Fidelity Insurance Company respectfully requests that its Petition for certiorari be granted.

Respectfully submitted,

NEIL L. HENRICHSEN
Counsel of Record
HENRICHSEN SIEGEL, P.L.L.C.
1850 M Street, N.W. Suite 250
Washington, D.C. 20036
(202) 293-7766
Attorney for Petitioner

Of Counsel:
LEWIS S. WIENER
HENRICHSEN SIEGEL, P.L.L.C.

Dated: April 16, 2001